

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Casses v. Backer*,
2012 BCSC 17

Date: 20120110
Docket: S098449
Registry: Vancouver

Between:

Fernando Casses

Plaintiff

And

Douglas Backer, Caroline Mitchell and Elizabeth Watkins

Defendants

And

Kathy Tomlinson and the Canadian Broadcasting Corporation

Third Parties

- and -

Docket: S098738
Registry: Vancouver

Between:

Fernando Casses

Plaintiff

And

Krystal Lee Cook

Defendant

And

Kathy Tomlinson and the Canadian Broadcasting Corporation

Third Parties

- and -

Docket: S099002
Registry: Vancouver

Between:

Fernando Casses

Plaintiff

And

Robin Lee Patricia O’Diorne

Defendant

And

Kathy Tomlinson and the Canadian Broadcasting Corporation

Third Parties

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Counsel for Plaintiff:	R. McConchie
Counsel for Douglas Backer and Krystal Lee Cook:	R.N. Beckmann (only appearing on June 10, 2011)
Counsel for Caroline Mitchell and Elizabeth Watkins:	B. Morely (only appearing on June 10, 2011)
Counsel for Robin Lee Patricia O’Diorne:	J. West (only appearing on June 10, 2011)
Counsel for the Third Parties:	D.W. Burnett
Place and Date of Trial/Hearing:	Vancouver, B.C. June 10 and 16, 2011
Place and Date of Judgment:	Vancouver, B.C. January 10, 2012

[1] There are two applications before the Court; both are opposed. The plaintiff, Fernando Casses (“Dr. Casses”), seeks to strike out the third parties, Kathy Tomlinson (“Ms. Tomlinson”) and the Canadian Broadcasting Corporation (“CBC”) response to civil claim of the third parties, in three separate actions.

[2] The third parties seek to consolidate these actions for all purposes. Since hearing this application, the plaintiff and all defendants have consented to have these actions heard at the same time.

[3] Dr. Casses, in support of his application, relies on Rules 3-5(12), 9-5 and 14-1 (costs) and the inherent jurisdiction of the Court:

Response to civil claim

(12) A third party who has filed a response to third party notice may, within the period for filing and serving a response to the third party notice, file and serve on all parties of record a response to civil claim to the plaintiff's notice of civil claim, raising any defence open to a defendant.

...

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[4] In addition, Dr. Casses seeks to strike the third party pleadings as they are oppressive, the mitigation paragraphs contravene the rules of pleadings and the pleadings are lacking in particulars.

[5] Dr. Casses specifically seeks to strike out paragraphs 1 to 7 inclusive of Division 2 and paragraphs 1 to 5 inclusive of Part 3 of Division 3 of the response to civil claim of the third parties.

ACTIONS IN THE SUPREME COURT OF BRITISH COLUMBIA, VANCOUVER REGISTRY

[6] Dr. Casses has commenced the following actions:

- 1) Docket number S098449 (“action number S098449”) - plaintiff, Fernando Casses v. Douglas Backer, Caroline Mitchell and Elizabeth Watkins, defendants and Kathy Tomlinson and The Canadian Broadcasting Corporation, third parties;
- 2) Docket number S098738 (“action number S098738”) - plaintiff, Fernando Casses v. Krystal Lee Cook, defendant and Kathy Tomlinson and the Canadian Broadcasting Corporation, third parties; and
- 3) Docket number S099002 (“action number S099022”) - plaintiff, Fernando Casses v. Robin Lee Patricia O’Diorne, defendant and Kathy Tomlinson and The Canadian Broadcasting Corporation, third parties.

[7] At the material time alleged in each action, Dr. Casses was a medical doctor and surgeon practicing in Quesnel, British Columbia

[8] Dr. Casses claims in each of these actions that each of the defendants made defamatory statements about him concerning the discharge of his professional duties and obligations. These defamatory statements were published in an article on the CBC website and in a series of CBC news broadcasts on September 8, 9 and 10, 2009, and in some instances in internet publications.

Action No. S098449

[9] The defendants in this action are the children of the late Edith Backer, who was a patient of Dr. Casses. The defendants made certain statements concerning the medical care that Dr. Casses provided to their mother, blaming him for their mother's death.

Action No. S098738

[10] Dr. Casses operated on Ms. Cooke's toe. Ms. Cooke blames Dr. Casses for the infection that occurred after surgery which she alleges lead to the amputation of her toe.

Action No. S099002

[11] Ms. O'Diorne was a patient of Dr. Casses, who performed surgery on her. She states that during the surgery he nicked her bladder causing her medical complications which he failed to address.

[12] The third parties are the CBC and Kathy Tomlinson, a journalist with the CBC.

PLEADINGS

Dr. Casses' Claims

[13] Dr. Casses claims against each of the defendants in each separate action multiple heads of damages as a result of the statements made by the defendants which he alleges are false, malicious and defamatory of him.

[14] These statements were published and broadcast by the third parties. Some of the defendants published the remarks to which Dr. Casses complains on the internet.

The Defendant's Defence

[15] The defendants in each action have filed a statement of defence or a response to civil claim in which they insist that Dr. Casses prove the statements and their publications. The defendants plead fair comment and justification. Certain statements are acknowledged as being made by the defendants in each of their actions, but deny that they are defamatory. The defendants plead mitigation. They allege that the third parties published the statements.

[16] Each of the defendants plead in the alternative that if Dr. Casses suffered damages, the damages are

nominal as Dr. Casses' reputation was already affected by others who made public statements not related to any of the defendants.

Third Parties

[17] In each action, the response to the civil claim of the third parties, the third parties admit that the CBC published the website and the television reports. The third parties acknowledge that the quotes of the defendants in each action are substantially accurate, but incomplete, alleging that the CBC relies on the entirety of the website and the television reports in their entirety for "accuracy, balance and context".

[18] The third parties plead fair comment, justification and responsible communication.

POSITIONS

Dr. Casses

[19] Dr. Casses commenced a separate action against separate defendants, arguing that the defendants must be accountable for their own statements by going to the CBC and ruining Dr. Casses' reputation. Dr. Casses in each separate action "pleads the natural and ordinary meanings ("popular" or "false" innuendo meanings or "stings") conveyed to the average, ordinary reader (the Plaintiff's Meanings)".

[20] Dr. Casses argues that he has chosen and is entitled to sue separately on each sting; that is, the words of Robin O'Diorne, Krystal Lee Cook, and the children of the late Edith Backer, Douglas Backer, Caroline Mitchell and Elizabeth Watkins.

[21] Dr. Casses argues that the third parties' response to civil claim is "an attempt to change the scope and focus of the defamation action" by changing each action as an action against Ms. Tomlinson and the CBC relating to the entire broadcast which dealt with Dr. Casses' alleged professional treatment of former patients, not only in British Columbia, but also in the State of Arizona, USA.

Third Parties

[22] The third parties argue that the CBC's program and website (the "publication") is a story about Dr. Casses, the treatment of his former patients in both Arizona and British Columbia, and the licensing and oversight of Dr. Casses by the College of Physicians & Surgeons of British Columbia (the "College").

[23] The third parties argue that the defendants in each of the actions are a small part of the broadcast and that there were other people interviewed for the program. Some of those interviewed filed complaints concerning their surgeries with the College as did two of the defendants in these actions.

[24] The third parties allege that Dr. Casses "is artificially cherry picking" (oral submission) by suing these defendants in separate actions to avoid the context and nature of the publications. The third parties allege that Dr. Casses has sued those defendants who did not make a complaint to the College (Ms. Cook), or those defendants whose complaints did not result in a finding of fault attributed to Dr. Casses in treating Ms. O'Diorne and the late Edith Backer. The third parties point out that Dr. Casses did not sue those interviewed

whose complaints to the College resulted in findings by the College against Dr. Casses or those who have filed negligence actions and whose actions were settled.

[25] The third parties argue that Dr. Casses' pleadings in each action rely contextually on interviews as a whole or on the combined effect of the publications.

THE LAW - Striking Pleadings

[26] The legal test for striking pleadings is not in dispute. The test is stringent and in order to be successful in striking pleadings, it must be "plain and obvious"; that is, in this case, the third party has no chance of success or it is an abuse of process: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 and *Chapman v. Canada*; *Westwick v. Canada*, 2003 BCCA 665.

[27] The court must consider the facts alleged in the pleadings are true; the inquiry under the Rule does not rely on evidence: *Canadian Bar Assn. V. British Columbia*, 2008 BCCA 92.

[28] For the plain and obvious test to apply, the third parties' response in this case, "must be hopeless in fact, or hopeless in law" and they are "entitled to a broad reading of the pleadings": *The Law of Defamation in Canada*, Second Edition, Vol. 3 by Raymond E. Brown and *Goddard v. Day*, 2000 ABQB 820. Further, that the pleading cannot be cured with an amendment: *Hemming v. Newton*, 2006 BCSC 1748.

[29] In *Strata Plan LMS 1328 v. Surrey (City)*, 2001 BCCA 693, the Court, in an appeal of an application in which third party pleadings were struck, summarized the "plain and obvious rule" relying on *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, and adopted the following criteria:

- (a) whether there is a question fit to be tried regardless of complexity or novelty;
- (b) the outcome of the claim at trial is beyond a reasonable doubt;
- (c) serious questions of law or questions of general importance are raised or if facts should be known before rights are decided;
- (d) pleadings might be amended; and
- (e) there is an element of abuse of process.

[30] In striking applications, the pleadings in defamation actions come under close scrutiny, more than in other civil actions. In *Marineland of Canada Inc. v. Niagara Action for Animals*, [2004] O.J. No. 3866, Mr. Justice Henderson stated:

[7] It is also useful to note certain maxims that apply to libel actions. In particular, if the defendants raise the defence of fair comment, the defendants must plead the facts that were known at the time of the alleged libel in order to establish a substantive base for the defendants' comments. Similarly, if the defendants raise the defence of justification, the defendants must plead the facts upon which the defendants rely to establish the truth of the defendants' comments. Therefore, with respect to both defences, the defendants have an obligation to set out the facts with more particularity than may be required in other types of civil lawsuits.

...

[18] In this case, the general nature of the letter is a criticism of the conditions at *Marineland*, the manner in which *Marineland* cares for its animals, and the welfare of the animals. In my view, a statement that

several animals have died at *Marineland* is part and parcel of the defendants' general criticism of *Marineland*. It is not a separate and distinct sting. Thus, the defendants may defend their comments in this respect in the Statement of Defence.

[31] Those matters raised in para. 18 of *Marineland* are similar issues that will be examined when considering the third parties' response, most of which Dr. Casses wishes to strike. Before doing so, the relationship with the third parties and the defendants must be considered.

Relationship of a Third Party and a Defendant

[32] Rule 3-5(12) limits the defences to which a third party may plead; that is, only those defences which are available to the defendant.

[33] A third party cannot be in a better position than the defendant: *Van Patter v. Tillsonburg District Memorial Hospital*, [1999] O.J. No. 2477. A third party cannot raise as a defence a cause of action not plead by the plaintiff: *Schreiber v. Lavoie*, 59 O.R. (3d) 130.

[34] Those limitations lead to the main argument of Dr. Casses; that is, the expansion by the third parties into matters not complained of by Dr. Casses in any of the three actions commenced by him.

Defamatory Words in Each Action

[35] In each statement of claim in each action, Dr. Casses sets out the alleged defamatory words he attributes to each named defendant as a result of interviews conducted by Ms. Tomlinson and re-published and authored by Ms. Tomlinson on CBC broadcasts that occurred on September 8, 9 and 10 and on a CBC website of September 11, 2009.

Vancouver Action No. S0098449 - Defendants: - Douglas Backer, Caroline Mitchell and Elizabeth Watkins, Children of the Late Edith Backer

[36] Dr. Casses alleges that Backer's and Mitchell's defamatory words were as follows:

My family filed a complaint with the College of Physicians & Surgeons of British Columbia against Dr. Fernando Casses concerning how our mother, Edith Backer, suffered needlessly when Dr. Casses failed to address serious complications arising from a surgery he performed on her.

My mother died last year after her bile duct and pancreas were sutured during the surgery.

Our complaint to the College also concerned how Dr. Casses refused to acknowledge and/or treat those complications.

Dr. Casses did not reveal or treat my mother's serious perforations and post-surgical infections.

[Collectively the "Backer Words"]

[37] Dr. Casses alleges that the defamatory words of Ms. Mitchell are exactly the same.

[38] Summarized as follows, Dr. Casses alleges that the words of Mr. Backer and Ms. Mitchell meant and were understood to mean that:

- Dr. Casses negligently performed surgery on Edith Backer causing needless pain and causing her

death;

- Dr. Casses deceitfully concealed from Edith Backer and others her serious complications from surgery;
- Dr. Casses failed to treat or negligently treat the complications arising from the surgery;
- Dr. Casses concealed from Edith Backer the perforations and failed to treat the infections arising from surgery;
- the behaviour of Dr. Casses warranted severe sanctions from the College.

[39] In a TV broadcast aired locally by the CBC, Dr. Casses alleges that a group of people are sitting around a dining room table, two being identified as Douglas Backer and the other Caroline Mitchell; the others are not identified. In the broadcast there is a close-up of a severely infected big toe and a photograph of the late Edith Backer, and papers with the letterhead of the College. Ms. Tomlinson's voice is heard referring to Dr. Casses and the College not taking their complaints seriously.

Vancouver Action No. S098738 - Defendant: Krystal Lee Cook

[40] Dr. Casses alleges that Ms. Cook's defamatory statements were as follows:

I suffered needlessly and was damaged permanently when Dr. Casses failed to address serious complications arising from a surgery he performed on me.

As a result of the surgery Dr. Casses performed on the big toe on my left foot, it became grossly swollen and infected and had to be amputated.

Dr. Casses also refused to acknowledge and/or treat those complications.

Dr. Casses did not reveal or treat my serious post-surgical infections.

He told me that he was sympathetic but I was milking it, quit being a baby.

That was what my toe looked like [identifying photographs].

[Hereinafter collectively the "Cook Words"]

[41] The photographs depicted Ms. Cook's left foot. [The "Cook Photographs"]

[42] Dr. Casses alleges that Ms. Cook re-published the "Cook Words" on the CBC website, which are as follows:

...They claim they suffered needlessly - and were damaged permanently - when he failed to address serious complications from his surgeries.

...

The most common complaint is not just that they suffered complications after Casses operated on them but that he refused to acknowledge and/or treat those complications.

In most cases, they said, serious perforations or post-surgical infections were not revealed or treated...

...Krystal Cook, whose grossly swollen and infected toe had to be removed by another surgeon.

"...I shouldn't have been 19 years old and missing a toe."

[43] Dr. Casses alleges that the Cook Words and the re-published Cook Words meant or were understood

to mean that which he alleges in the Backer action.

[44] Ms. Cook also had her words and her photographs of her toe re-published in which Ms. Tomlinson repeated some of Ms. Cook's words. Dr. Casses alleges that Ms. Cook on a CBC internet website recommended that other persons view the article and the alleged libellous broadcasts stating:

- a) Posting on September 9, 2009 at 1:35 PM which reads "Story on the CBC last night about a doctor here in Quesnel...be careful, he could show up in McMurray next, <http://www.cbc.ca/Canada/britishcolumbia/story/2009/09/08bc-arizonadoctor.html=socialcomments-submit>"; and
- b) Posting on September 9, 2009 at 3:30 PM which reads: "Its very very hard to get a doctor to say something bad about another doctor. When he operated on my foot, and the doctor who did the eventual amputation was sickened but he wouldn't say anything bad about him. Sad thing is I'm not betting anything is going to happen to him. At most he may move his practice (he doesn't live in Quesnel) somewhere else and start all over again"; and
- c) Posting on September 9, 2009 at 11:07 PM which reads: "that's a big thing i dont understand. He is very very well educated...yet he makes the mistakes again and again. I would rather have Dr. Nick from the Simpson's operate on me!!"; and
- d) Posting on September 10, 2009 at 11:34 AM which reads: "The story is flying around the net and FB. There is a comment section on the cbc page and its getting lots of comments, and there is people that we don't even know he hurt coming forward. 2 more people have been added to the list through the story. Hopefully this is going to get him stopped, and not just in Quesnel but everywhere".

Vancouver Registry Action No. S099002 - Defendant: Robin Lee Patricia O'Diorne

[45] Dr. Casses alleged that her libellous remarks are:

I filed a complaint with the College of Physicians & Surgeons of British Columbia against Dr. Fernando Casses.

Dr. Casses caused me to suffer needlessly.

I was damaged permanently when Dr. Casses failed to address serious complications arising from a surgery he performed on me.

My complaint to the College also concerned Dr. Casses refused to acknowledge and/or treat those complications.

Dr. Casses did not reveal or treat my serious perforations.

My bladder was nicked during surgery.

Another surgeon who operated on me after Dr. Casses told me that it was a bloody mess in there - and if it had been the next day - I probably wouldn't have survived.

[Hereinafter collectively the "O'Diorne Words"]

[46] Dr. Casses alleges, similarly as with the other defendants, that Ms. O'Diorne participated in television news stories, broadcasts by the CBC and Ms. Tomlinson in re-publishing her remarks. Dr. Casses alleges that defamatory words published by Ms. O'Diorne on the CBC website are as follows:

Several people in Quesnel, B.C., have filed complaints about their hospital's general surgeon, Dr. Fernando Casses. They claim they suffered needlessly - and were damaged permanently - when he failed to address serious complications from his surgeries.

...

The most common complaint is not just that they suffered complications after Casses operated on them, but that he refused to acknowledge and/or treat those complications.

In most cases, they said, serious perforation...were not revealed or treated...

"[the other surgeon] told me that it was "a bloody mess' in there - and if it had been the next day - he would have been on the golf course, and I probably wouldn't have survived," said O'Diorne, who's suffered complications after she said her bladder was "nicked" during surgery by Casses.

Dr. Casses states that these words meant and were understood to mean exactly that which was alleged in the Backer and the Cook Words.

[47] Dr. Casses also alleges that the defendants expected and intended that their remarks would find their way to the CBC internet website.

[48] In each of the statements of claims, Dr. Casses describes the particular defendant or defendants in each action sitting around a dining room table with other individuals not identified. In each of these visual broadcasts there is a photograph of an older woman smiling, identified only in the Backer action as Edith Backer and photographs of an infected toe and amputated toe identified only as Ms. Cook's toe in the Cook action. Some of the video and audios listed in each statement of claim with their periods of time are exactly the same in each action.

[49] Dr. Casses argues that each of these actions are separate stings. Dr. Casses further argues in each of these actions the evidence will be that of a medical malpractice case despite the fact it is a case about defamation. Dr. Casses claims that each action is about him and each patient in each action. Dr. Casses argues that negligence in one action is not negligence in another action, and that the defendants made specific allegations about the medical care proved by him.

[50] Dr. Casses argues that the defendants are not permitted to plead justification or fair comment to other separate and distinct libels that Dr. Casses does not complain of in the statement of claim. There are no allegations from each of the defendants concerning separate actions about negligent acts by Dr. Casses made by other former patients in British Columbia or in Arizona.

[51] The third parties' response restated the ordinary meaning of the words complained of in the context of the entire broadcast:

Division 2 - Third Parties' Version of Facts

1. The ordinary meanings of the words complained of, in their context, were:
 - a) The Backer case, together with numerous other cases in British Columbia about Dr. Casses's surgery, raises troubling questions about the oversight and licensing of Dr. Casses in British Columbia given his history of quality assurance concerns, suspension, unprofessional conduct and negligence in Arizona before coming to British Columbia and being licensed to practise in British Columbia.
 - b) In the British Columbia cases, including the Backer case, there were cases in which the College of Physicians & Surgeons of British Columbia did not find fault with Dr. Casses, other cases in which he was found to have fallen below the required standard of care, and other cases in which there has been no ruling one way or the other.
 - c) There were incidents in which Dr. Casses did not adequately admit or treat complications after surgery.

[52] The third parties are entitled to plead defences available to the defendant. Besides justification and fair comment, the third party raises responsible communication, a defence not limited to journalists, but also to others on matters of public interest; (*Grant v. Torstar Corp.*, 2009 SCC 61).

[53] In raising these defences, the third parties refer to negligent surgeries and law suits in both Arizona and British Columbia, as well as disciplinary action taken by the Board of Medical Examiners in Arizona (“Bomex”) and the College. In addition, the third parties refer to the Backer, Cook and O’Diorne surgeries. Dr. Casses argues that these complaints are separate from the stings alleged in each action upon which Dr. Casses chose to sue.

[54] Dr. Casses relies on all the interviews of the defendants in each action for the meanings that he pleads. In the Cook and the O’Diorne statements of claims, paragraphs 9, 11, 14, 17 and 20, Dr. Casses’ states “in the context of the ... (pleads the date of the particular broadcast or article) as a whole, the words complained of in ... (the article or broadcast) meant and was understood to mean: ...”. In the Backer action, the pleadings are exactly the same, but the paragraphs in that statement of claim are 6, 10, 16, 18, 21, 24 and 27.

[55] In paragraphs 12, 15, 18, 21 and 23 of Dr. Casses’ statements of claim in the O’Diorne and Cook actions, he pleads alternatively that by “legal innuendo, the defamatory meanings ... were conveyed by the combined effect of the publications”. This refers to the local televisions broadcasts and article, each of which are detailed as to its date. In order to support his claim in each action, Dr. Casses relies on the other actions. The same is pled in the Backer action in paragraphs 25, 28 and 33.

[56] Under the plea of responsible communication, the CBC raises the issue of safety of patients and whether the College in the licensing of Dr. Casses is a matter of public interest. The CBC then particularizes negligence of and the suspension of Dr. Casses in Arizona to specific cases where Dr. Casses was found at fault, either by the doctors’ governing body in Arizona or by a court. The CBC also raises complaints and lawsuits in British Columbia regarding Dr. Casses’ care of patients, particularizing specific patients not only the specific defendant in the lawsuit, but the other defendants contained in the two lawsuits that are before the court. The third parties then plead justification and fair comment based on the Arizona and British Columbia complaints.

[57] The third parties plead mitigation stating that if the plaintiff suffered damages, those damages were not caused by the publications, but by the plaintiff’s own history of negligence and suspension and complaints as particularized in Division 2 of the third party pleadings.

[58] The issue is whether the Backer, Cook and O’Diorne words are separate stings or individual defamations, permitting Dr. Casses to chose to sue individuals, such as the Backer children, Ms. Cook and Ms. O’Diorne or are these publications as alleged by the CBC and Ms. Tomlinson, a broadcast and website about a surgeon, Dr. Casses, who is licensed to practice medicine and perform surgery in British Columbia, whose performance has come under scrutiny by the College in British Columbia, Bomex, the courts in British Columbia and the courts in Arizona.

[59] The third parties allege that the Backer children, Ms. Cook and Ms. O'Diorne are only three of a number of individuals who were interviewed for this program and in assessing the publications they must be assessed in their entirety as to context and purpose, not just in slices as Dr. Casses has chosen to do.

ANALYSIS

[60] The defendants, the Backer children, Ms. Cook and Ms. O'Diorne are but a small portion of the publications; that is, the three television broadcasts and the website. The pleadings in these separate actions demonstrate that in order to prove his case, Dr. Casses will rely on all of the publications; those of which he complains and those that he does not.

[61] The court is entitled to examine and judge the whole of the publication. In these publications it is argued that the defendants are entitled to raise responsible communication and fair comment. "Both defences entail a complex public interest analysis and a balancing of the fundamental values. Taken as a whole, the pleadings raise a number of serious and important questions that are fit to be tried". (Paragraph 5 of Part 5 of third parties revised response application).

[62] In *S and K Holdings Ltd. v. Throgmorton Publications Ltd.*, [1972] 3 All ER 497, Lord Denning stated that

It seems to me that, in cases where the jury are entitled to see the whole, the defendants are entitled to plead justification are admissible. They should not be struck out. I realise that this may mean a lengthening of the trial, but that has to be put up with. If the defendants fail to prove them, they will have to pay the costs; but I do not think we can strike them out. I think therefore the appeal should be dismissed.

[63] In *Pizza Pizza Ltd. v. Toronto Star Newspaper Ltd.*, [1998] O.J. No. 4702, a similar argument was made. In *Pizza*, the plaintiff company sued one of the franchise holders concerning statements he made based on the meanings that it determined. In *Pizza*, the court found that the defendant was not limited to the plaintiff's meaning and could look at the whole publication for a meaning different than that which was alleged by the plaintiff.

[64] However, the defendant is at times limited depending on the nature of the defamatory statements. That distinction was made by Mr. Justice Sharpe in *Pizza* when he stated:

[16] It is important to note that in *Polly Peck*, in order to protect the plaintiff from unfairness or oppression, the English Court of Appeal qualified the right of the defendant to plead justification to a different meaning. First, where a publication contains separate and distinct libels, the plaintiff is entitled to select one and sue on it, and the defendant is not permitted to assert the truth of the other defamatory statements. The defendant's right to plead justification only arises where it can reasonably be claimed that the article from which the offending words are taken has a "common sting" and does not make separate and distinct allegation.

...

[19] Second, even if the plaintiff could be limited to the meaning it pleads, I do not accept the submission that it is appropriate to give the plaintiff the exclusive right to define the issue for trial. It would, in my view, be fundamentally unfair to the defendants in this case to preclude them from justifying their version of the libel. Simply put, if the plaintiff is entitled to present its side of the case by selecting certain words as being offensive and claiming that the defendant has called it "a cheat", the defendant should be allowed to respond fully to the allegations made against it...Where, as in the present case, the defendant

asserts a different but also defamatory meaning, its position becomes scarcely tenable before the trier of fact if it is precluded from pleading and providing the truth of that meaning. How can it be fair to these defendants who say “we did not call you a cheat, but we do say that you exploit, take advantage of and treat your franchisees unfairly” to preclude them from pleading and proving the truth of those very serious allegations. By curtailing the right of the defendant to explain fully what it said and why it said it, the traditional rule places the defendant in an awkward and unfair tactical position. It seems to me that in a case such as the present, the defendant can only explain its position adequately if allowed to say not only: “read this article as a whole - this is what it means” but also “and this meaning is true”.

[20] ... A defamation suit such as the present one represents a direct challenge to the right of a newspaper to publish an account of the concerns expressed by a particular group of people. It is important, in the interests of freedom of expression and freedom of the press, for the newspaper to be allowed to defend itself fully by presenting its entire case to the court for consideration. From this perspective, it is difficult to see why the newspaper should not be able to defend itself by saying “this is what we meant and what we meant is true”.

[21] ... The modern English rule at issue in this appeal represents an even more modest change. That it strikes a more appropriate balance between protection of reputation and freedom of expression and freedom of the press provides added justification for its adoption here.

[22] ... However, the interests of efficiency of discovery and trial carry little weight if achieved at the price curtailing the right of a party from presenting its entire case, particularly where fundamental rights are at issue. If it takes longer to try the whole case, so be it.

[23] Finally, I would emphasize that the Polly Peck approach is a balanced one that does take into account the interests of the plaintiff. The court retains a discretion to protect the plaintiff from unfairness or oppression. The right of the defendant to plead and provide the truth of a different meaning is not unfettered. The defendant is not permitted to plead justification to a separate or distinct libel. To that extent, the plaintiff is entitled to plead and rely on one libel without risking the embarrassment of the defendant attempting to justify another. I hasten to observe that the defendants are not guilty of attempting to do this in the case at bar. They simply ask the trier of fact to take the article as a whole and to determine its meaning that light rather than solely on the basis of the words selected by Pizza Pizza.

[My emphasis]

Those emphasised words are the precursor of the defence of responsible communication as found in *Grant*.

[65] The determination as to whether the stings are separate or not, depend on the facts.

[66] The defendant is entitled to plead a lesser or alternative defamatory meaning when considering whether the sting is separate and distinct and to justify that alternate defamatory meaning.

[67] In each of these actions, Dr. Casses is isolating the comments of the defendants, choosing their remarks over other interviewees because their complaints had either never been reviewed by the College or no finding made by the College. In *Pizza*, the plaintiff chose only the remarks of one franchisee and not the whole publication, which was about how the *Pizza*'s franchisees were treated by the plaintiff. Similarly, others, and not just the Backer children, Ms. Cook and Ms. O'Diorne, had similar remarks and complaints concerning Dr. Casses.

[68] This leads to the question as to whether the statements made by the defendants in each of these actions are a separate sting - I think not. These publications were about the College's lack of oversight and their licensing of Dr. Casses, given the number of complaints by former patients, including all of the defendants, findings by the College of substandard professional conduct which occurred not only in British

Columbia, but also in Arizona prior to his being licensed in British Columbia.

[69] In *Prager v. Times Newspaper Ltd.*, [1988] 1 All ER 300 (C.A.), the plaintiff, a boxing promoter, sued the defendant who published an article in which the plaintiff boxing promoter is alleged to have formed an alliance with another boxing promoter who used stolen funds to fund his boxing promotion. The defendants pled a wider meaning, which was, that the plaintiff acted disreputably with Mr. Smith by concealing from the California Athletic Commission and opposing boxers the true amount of the purses paid and that the plaintiff received from Mr. Smith \$350,000.00, the source of which was suspicious. That meaning did not stand. The court found that the sting was that the plaintiff boxing promoter formed an alliance with another boxing promoter who used stolen funds to fund his boxing promotions. It was left open to the defendant to amend and plead that the plaintiff was not cautious in dealing with Mr. Smith and or “had acted disreputably in the course of such dealings”.

[70] In *Cruise v. Express Newspapers Plc.*, [1999] Q.B. 931 (C.A.), an article appeared about a famous actor and actress, Mr. Cruise and Ms. Kidman. It related to the alleged arrogance of Ms. Kidman, their marriage being a sham and being a cover for homosexuality and the adoption of their children as being fashionable. Also in the newspaper article there was an attack upon their religion.

[71] Cruise and Kidman sued only on the alleged libel as to the arrogance of Kidman, their sham marriage and the adoption of their children; not the allegation concerning their religion.

[72] The defence pled, not only to matters relating to the marriage and their children, but also introduced allegations concerning their religion on which Cruise and Kidman had not complained.

[73] In *Cruise*, the court found that the newspaper article contained two separate distinct stings and that the plaintiffs could choose to sue on one sting only and that the other separate sting concerning the plaintiffs’ religion could not be raised on pleas of justification and fair comment.

[74] In *Cruise*, Lord Justice Brooke states starting on p. 16:

...in *Polly Peck (Holdings) plc v. Trelford* [1986] 1 QB 1000 the court held that where a publication contains two or more separate and distinct defamatory statements, the plaintiff is entitled to select one of them for complaint, and the defendant is not entitled to assert the truth of the other(s) by way of justification.

...

...The focus of a strike-out application is no longer at large, as it was in *Waters*. The defendant is now tied to his pleadings, and the plaintiff can apply to have a plea of justification or fair comment struck out if he contends that it is not properly arguable that the words complained of are capable of bearing the meaning(s) relied on by the defendant; or that the meaning(s) relied on are not defamatory; or that a particular meaning, although defamatory, conveys a separate and distinct sting from that relied on by the plaintiff makes no complaint about that separate sting.

...

This court held that insofar as these statements were defamatory of Mr. Nadir they were not separate and distinct allegations in the sense explained in the judgement of O’Connor LJ at p 1032D, which was in these terms:

“Whether a defamatory statement is separate and distinct from other defamatory statements contained in the publication is a question of fact and degree in each case. The several

defamatory allegations in their context may have a common sting, in which event they are not to be regarded as separate and distinct allegations. The defendant is entitled to justify the sting, and once again it is fortuitous that what is in fact similar fact evidence is found in the publication.”

[75] It cannot be said that the third party pleadings are bound to fail.

OPPRESSION

[76] Dr. Casses argues in the alternative that the particulars contained in the third party pleadings, Division 2, subparagraphs 2 and 3, all in support of reasonable communication, should be struck as they are oppressive to Dr. Casses.

[77] In *Polly Peck*, O'Connor L.J. stated at para. 102:

In all cases it is the duty of the court to see that the defendant, in particularising a plea of justification or fair comment, does not act oppressively. Whether the particularisation of the plea is oppressive depends not only on the facts of each case, but also on the attitude of the plaintiff. I say this because a plaintiff can limit the extent and cost of inquiry at trial by making timely admissions of fact.

[78] The Court has always had jurisdiction to strike pleadings “where it is relevant, where its probative value is outweighed by its prejudicial effect”: *Asper v. Lantos*, [2000] O.J. No. 3712.

[79] At the same time, whether the particulars are oppressive or not is balanced against the defendant’s right to freedom of expression and the right to present its entire case and a full defence: *Pizza*.

[80] In *Quizno’s Canada Restaurant Corp. v. Kileel Developments Ltd.*, [2008] O.J. No. 3674, Mr. Justice Blair stated at para. 23:

... A defendant is entitled to plead whatever material facts it chooses to in response to a plaintiff’s allegations, provided the allegations are relevant and of at least marginal probative value and their probative value is not outweighed by their prejudicial effect. While the court will look at “[the extent to which] the particulars attacked are necessary to enable the defendant to prove its case,”² it is not for the court to prune the case at this stage and limit the allegations to what it considers a “reasonable defence”.
...

[81] I cannot conclude that the particulars plead in the third party response in Division 2, subparagraphs 2 and 3 are oppressive and prejudicial; rather they are essential to the defence of this case brought by the plaintiff.

MITIGATION

[82] The third party argues that at trial, mitigation goes to the admissibility of evidence and that the consideration of pleadings is not the time to deal with the admissibility of evidence. The plaintiff argues at paragraphs 22 and 23:

22. The Plaintiff respectfully submits that the Impugned Mitigation Paragraphs contravene the rules of pleading matters in mitigation of damages in a defamation action, and therefore ought to be struck.

23. The Third Parties are not permitted to plead or lead evidence concerning instances of specific alleged acts of misconduct by the Plaintiff, or rumours and suspicions to the same effect as the defamatory matter complained of. Only the Plaintiff’s general reputation in his community is relevant and

can be pleaded. Brown, *The Law of Defamation in Canada*, 2nd ed., at pp. 22-135 to 22-136; *Prager v. Times Newspaper Ltd.* per Russell LJ at 312 g citing *Plato Films Ltd. v. Speidel*, [1961] 1 All ER 876 (H.L.); *Ager v. Canjex Publishing Ltd. (c.o.b. Canada Stockwatch)*, 2003 BCSC 891 at para. 68, varied on other grounds 2005 BCCA 467. At most, evidence of facts and circumstances tending to show the disposition of the Plaintiff tends to prove not that the Plaintiff has not, but that he ought not to have, a good reputation. *Scott v. Sampson*, [1882] 8 QBC 491, per Cave J. at pp 504-505; *Carter-Ruck* at pp. 514-517.

[83] Dr. Casses seeks to strike out facts which go to mitigation. Dr. Casses and the third parties by their positions, agree that the admission of evidence should be left to the trial judge at the time of trial.

[84] In *Quizno's*, Mr. Justice Blair comments:

[16] Pleadings are not the appropriate stage in an action to engage at large in what is essentially a trial judge's exercise for determining the *admissibility of evidence at trial* - i.e., weighing the probative value versus prejudice of facts. That exercise is not particularly well-suited to *defining issues for trial*, something which is for the parties to decide. ...

[85] I agree that the admission of evidence should be left to the trial judge.

PARTICULARS

[86] Dr. Casses seeks to have the justification, fair comment and responsible communication defence and the mitigation paragraphs struck because “lack clarity and specificity and plead evidence” (paragraph 31 of Dr. Casses’ notice of application). Should these pleadings be lacking, as alleged by Dr. Casses, this can be cured by Dr. Casses seeking further and better particulars pursuant to the *Rules*.

DISPOSITION

[87] Dr. Casses’ application is dismissed.

COSTS

[88] The defendants shall each have their assessed costs, scale B, in any event of the cause.

“H.C. Hyslop J.”

HYSLOP J.